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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 4th August, 2018

Pronounced on: 6th May, 2019

+ **CRL.A. 851/2017**

PRAVESH DIXIT @ TINDA Appellant
Through: Mr. K. Singhal and Mr. Nishant
Bhardwaj, Advs.

versus

STATE NCT OF DELHI Respondent
Through: Mr. G.M. Farooqui, APP for
State with SI A. Negi, PS Dwarka South

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

1. The appellant Pravesh Dixit @ Tinda stands convicted, *vide* judgment dated 23rd February, 2017, under Sections 367 and 342 of the Indian Penal Code, 1860 (the IPC) and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, having been found guilty of subjecting a child, 17 years and 4 months of age (who would be referred to, hereinafter, as 'X'), to "penetrative sexual assault". Consequent thereto, the appellant has, *vide* subsequent order dated 27th April, 2017, been sentenced to 10 years' rigorous imprisonment (RI), for commission of the offence punishable under Section 4 of the POCSO Act, to 1 year's RI for the offence punishable under Section 342 of the IPC, and to 2 years' RI for the offence punishable under section 367 of the IPC, the sentences being directed

to run concurrently. He has also been sentenced to pay fines of ₹ 1 lakh, ₹ 50,000/- and ₹ 1000/-, for the offences punishable under Section 4 of the POCSO Act, and Section 367 and Section 342 of the IPC, respectively, with default sentences of one year, 6 months' and 3 months' simple imprisonment for each offence. Out of the said amount, the learned Special Judge has directed disbursement of ₹ 1,20,000/- to X.

2. The appellant is in appeal.

The Impugned Judgment

3. The factual backdrop of the case, as set out by the Learned ASJ in the impugned judgment, may be set out thus.

4. At about 05:10 PM on 26th February, 2013, information was received by the police, from Mobile No. 9716553226, regarding a quarrel. The information was assigned to SI Ghasi Ram (PW-18), who reached the spot along with Const. Jayprakash (who was not co-opted as a witness). The information was also conveyed to (W/SI) Ramwati. The IO SI Ghasi Ram (PW-18) proceeded, from the spot, to the Deen Dayal Upadhyay Hospital (hereinafter referred to as "the DD Hospital"), where they found X along with her parents and her friend PW-3- who, also being a minor, shall be referred to, hereinafter, as M. The statement of X was, thereafter, recorded by the I/O SI Ghasi Ram (PW-18). PW-14 Narender Sharma, who was found at the spot where the assault was stated to have taken place, disclosed the name of the

appellant, and stated that he was known by the name Raj Dixit. Thereafter, the statement of X was recorded, and endorsed by the Police authorities. X deposed, in her statement (under Section 161 of the Cr.P.C.), that (i) on that day, i.e. on 26th February, 2013, she had left the house, at 02:00 PM., supposedly for tuition, but had, instead, proceeded to meet PW-3 (M), whom she had called to the Palam Flyover, (ii) while they were waiting at the bus stop, M (PW-3) received a call on his mobile phone which he disclosed to be of Raj Dixit, (iii) five to ten minutes later, a white Swift Dzire car, containing Raj Dixit and two boys, arrived at the spot, (iv) M (PW-3) informed her that the driver of the car was his friend Raj Dixit, (v) on being invited by Raj Dixit, she, and M sat in the car, (vi) Raj Dixit proceeded to drop the two other passengers, and, thereafter, drove M and X to a Pizza Hut outlet, where he gave her juice to drink, (vii) they then proceeded to the Metro Station at Sector-9, Dwarka, where they reached at about 04:00 PM, (viii) Raj Dixit asked M to get a document from the Maruti Showroom located there, (ix) Raj Dixit, thereafter, drove her to an unknown place, claiming that it was his farmhouse, (x) at that time, a call from M was received on the mobile phone of Raj Dixit, (xi) Raj Dixit directed X to tell M that he had gone to his house to get his debit card, leaving his phone in the car, and to disconnect the call after conveying the said message, (xii) to a query by X, as to why Raj Dixit had coerced her to lie to M, regarding his having gone to his house to get his debit card, Raj Dixit responded that the whole area belonged to him and he could do whatever he wanted, (xiii) X, thereafter, alighted from the car, but, on finding that she had left her bag in the car, returned, whereupon Raj Dixit pushed

her onto the rear seat of the car and locked the car from inside, (xiv) on X requesting that she be permitted to go, Raj Dixit threatened her, reiterating that the entire area belonged to him, and that he would call 8 to 10 persons, who would gang rape her, (xv) she was unable, in the circumstances, to alight from the car, (xvi) Raj Dixit, thereafter, threatened X and abused M, whereupon she agreed to act as per his dictates, out of fear, (xvii) Raj Dixit, thereafter, removed her jeans and raped her, (xviii) having done so, Raj Dixit stated that he would marry X, to which X responded that she did not desire to marry him and requested that she be dropped at her house, (xix) Raj Dixit dropped her at the Palam Flyover and left, (xx) X, thereafter, called M, who sent his friend Aditya (PW-2) to the spot on his Scooty, on which he drove her to the Sector-9, Metro Station at Dwarka, and (xxi) thereafter, the PCR took her, as well as M to the hospital, where she was examined. Consequent to the said examination, a case was registered by the Police. During the course of investigation, the evidence was collected, the statement of witnesses were recorded, and the appellant was arrested.

5. *Vide* order dated 12th July, 2013, the appellant was charged with having committed offences punishable under Sections 367 and 342 of the IPC, as well as Section 4 of the POCSO Act. These provisions are, for ready reference, reproduced thus:

“342. Punishment for wrongful confinement. –

Whoever wrongfully confines any person shall be punished with imprisonment of either description for a

term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. – Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

“4. Punishment for penetrative sexual assault.

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.”

6. The appellant pleaded not guilty and sought trial, which, thereupon, commenced.

7. During the course of trial, the prosecution led the evidence of twenty one prosecution witnesses (PWs), who may be enumerated as under:

Sl. No.	Witnesses	
1.	PW-1	X
2.	PW-2	Aditya Panwar
3.	PW-3	Abhay
4.	PW-4	Manu Vedwan, MM
5.	PW-5	D.S. Rana, Yoga Teacher Kendriya Vidhalaya, Vikas Puri
6.	PW-6	Parveen, Lab Attendant, FSL

		Rohini
7.	PW-7	Amit Bhanwala, Scientific Assistant, FSL Rohini
8.	PW-8	Dr. Megha Batra, Medical Officer, DDU Hospital
9.	PW-9	ASI Manjeet Singh
10.	PW-10	Dr. Avnish Bhargava, Medical Officer, DDU Hospital
11.	PW-11	Dr. S. Renu Bala, Sr. (OBG), DDU Hospital
12.	PW-12	Dr. Dayanand, Sr. Resident (Surgery), DDU Hospital
13.	PW-13	W Constable Kavita
14.	PW-14	Narender Sharma
15.	PW-15	Ct. Sandeep
16.	PW-16	Ct. Ranbir
17.	PW-17	HC Amar Chand
18.	PW-18	SI Ghasi Ram
19.	PW-19	SI Ramwati
20.	PW-20	Insp. Sunil Godiyal
21.	PW-21	L. Babyto Devi, Assistant Director, Biology, FSL

Evidence

Prosecution Witnesses

8. The prosecution witnesses may be divided into four categories, i.e.
- (i) The prosecutrix X,
 - (ii) The police witnesses, namely, PW-9, PW-13, PW-15, PW-16, PW-17, PW-18, PW-19 and PW-20
 - (iii) Witnesses who tendered medical/forensic evidence, namely, PW-6, PW-7, PW-8, PW-10, PW-11, PW-12 and PW-21 and

(iv) Other witnesses, namely, PW-2, PW-3, PW-4, PW-5 and PW-14.

9. The evidence of these witnesses may be briefly dealt with thus:

The Prosecutrix X

10. The statement of X was recorded in-camera, keeping the appellant behind a curtain and out of sight of X. Her testimony was recorded after she was offered a glass of drinking water and made comfortable, and was recorded in the presence of her parents.

11. X testified, before Court, that, on 26th February, 2013, she left her house at 02:00 PM, for attending tuition classes, and that, prior to proceeding for the said class, she called M (PW-3), as she desired to borrow books from him, in order to prepare for her examination. She stated that M met her at the Palam Flyover, where he received a phone call from the appellant, who told him (M) that he was coming to the Palam Flyover to pick him up. 10 to 15 minutes later, the appellant arrived at the spot in a Swift Dzire car, accompanied by two other persons. She, and M, sat in the appellant's car, and proceeded therefrom. The appellant, dropped both the other persons travelling in the car, leaving M and herself. Thereafter, according to her testimony, the appellant drove them to the Sector-9 Market in Dwarka, where, from a Pizza Hut outlet, from where he bought two bottles of beer and one can of juice, which he offered to her. Thereafter, according to her deposition, the appellant took them (PW-3 M and herself), to a car showroom, where he requested M (PW-3) to alight and call one of his

friends from the showroom. As soon as M (PW-3) alighted, the appellant started the car, called M (PW-3) and requested him to connect the call to his friend, to whom the appellant stated that he was going to collect his debit card and would return in 10 to 15 minutes. X further deposed that, thereafter, the appellant drove her, in his car, to a secluded rural area. On her querying as to why he had brought her to the said area, when he was supposed to collect his debit card from his house, the appellant responded that, on the pretext of collecting his debit card, he had brought her to the said area and would do, with her, whatever he liked. She further testified that, M (PW-3) called on the mobile phone of the appellant, and that, on her attempting to escape from the car, the appellant threatened her that he would call some of his friends who would gang rape her. According to the evidence of X, the appellant, thereafter, directed her to call M (PW-3) and inform him that they were at the house of the appellant from where he was collecting his debit card and that they would be returning in ten to fifteen minutes. She conveyed the said message, whereafter M (PW-3) disconnected the call. X further deposed that she, at this point, started crying, whereupon the appellant threatened her and asked her to kiss him, failing which he again threatened with gang rape. She stated that she somehow managed to open the door of the car and get down, but, on finding that she had left her bag in the car, returned to the car to collect it, seizing which opportunity the appellant pushed her inside the car, threatening her, again, that he would have her gang raped, and would film the act. X alleged that the appellant kissed her, and, abusing M (PW-3), stated that she would get nothing from M (PW-3), whereas she could marry the appellant and be happy. Thereafter, X

alleged that the appellant managed to pull down her jeans and rape her.

12. After the act had been committed, X asked the appellant to take her to M (PW-3), but the appellant refused, and instead, dropped her at the Palam Flyover, from where she called M (PW-3), who informed her that he had contacted the police and that his friend Aditya (PW-2) would arrive at the spot. She further deposed that, around 6:00 PM Aditya reached the spot on his Scooty, on which he drove her to the car showroom at Dwarka, where she found M (PW-3) with certain policemen. She further deposed that, on the policemen enquiring from her, she narrated the entire incident to them, whereafter they took her to the DDU Hospital where she was medically examined at about 8:00 PM *vide* MLC No. 4649 (Ex. PW-1/A). The doctor at the hospital retained her clothes, and she returned to the PS Dwarka South, where her statement (Ex. PW-1/B) was recorded by the IO under Section 161 of the Cr.P.C. She further confirmed that, during the course of investigation, she had shown the IO SI Ghasi Ram (PW-18) the place from where the appellant had picked them up, the place where M (PW-3) was dropped by the appellant, and the place where she was dropped by the appellant, after the offence had been committed, in respect whereof, her instance, Site plans (Ex. PW-1/C, PW-1/D and PW-1/E) were prepared, which bore her signatures.

13. X correctly identified the appellant in court, by peering through the curtain behind which she was standing. She also identified the statement recorded from her under Section 161 of the Cr.P.C., which

was, consequently, exhibited as Ex. PW-1/F. She further identified the clothes and undergarments, which were worn by her, at the time of commission of the alleged offence, which had been received from the FSL. The said clothes were, therefore, exhibited as Ex. P-1 (colly) and Ex. P-2.

14. Learned counsel, who appeared for the appellant before the Learned ASJ, submitted that he was not disputing the identity of the Swift Dzire car no. DL 9C AB 9463, which was, accordingly, exhibited as Ex. P-3

15. The prosecutrix X was cross-examined by learned counsel for the appellant. She clarified, during the course of cross-examination, that she had never visited the house of M (PW-3) and was unaware as to how the doctor in the hospital recorded that she had done so. During further cross-examination, the attention of X was invited to her MLC, which stated that her hymen was “old torn”, to which she, while stating that she did not understand the meaning of the said expression, submitted that she had never engaged in sexual intercourse prior to commission of the alleged offence by the appellant. She stated that she was not aware as to how her MLC recorded “hymen old torn”. She also confirmed that she had not received any injury at the time of commission of the alleged offence, as well as the fact that she had not disclosed the said incident to the doctors who had examined her, and had disclosed it, for the first time, to the police. She complained that the doctors had not recorded all facts as narrated by her. She denied the suggestion that M (PW-3) was her boyfriend, as well as various

other suggestions, which were put to her in an attempt to discredit her testimony. She accepted the fact that, prior to the act of the assault, the appellant did not hold her hand or subject her to any act of physical restraint, and also admitted that, during the incident, she did not open the window of the car or make any noise. She denied the allegation that she had falsely implicated the appellant, in connivance with M (PW-3).

Police Witnesses

16. Among the police witnesses, one may conveniently start with the evidence of PW-18, the IO SI Ghasi Ram.

17. PW-18 deposed, in his examination-in-chief on 11th September, 2015, that consequent to receipt of DD No.20-A, on 26th February, 2013, he, along with Const. Jayprakash, reached Sector-9, Metro Station, Dwarka, where they met PW-2, alongwith M (PW-3), who informed him that (a) he, alongwith X, was standing on the Palam Flyover at around 2:00 PM to 2:30 PM on the same day, when Raj Dixit, arrived at the spot in his Swift Dzire car and asked them to sit in the car, (b) thereafter, Raj Dixit drove M (PW-3) and X to a car showroom at Sector-9, Dwarka, Metro Station, where he (i.e. PW-3) alighted from the car and went to the showroom, where he met Narender Sharma (PW-14), and got Narender Sharma to speak to Raj Dixit telephonically, (c) on coming out of the showroom, he found that Raj Dixit had left the place, with X, in his car, (d) he attempted to contact X telephonically but, on failing, he contacted the police by

dialing “100”, (e) he, thereafter, returned to the showroom and, on enquiry, was informed by Narender Sharma (PW-14) that, the real name of the appellant was Pravesh Dixit @ Tinda, and (f) it was only at 06:30 PM that he received a call from X, who told him that she was waiting under the Palam Flyover, whereupon, at his request, his friend Aditya (PW-2) picked her up and returned to the Metro Station at around 06:45 PM along with X. PW-18 further deposed that X informed him that the appellant Pravesh Dixit @ Tinda had committed a wrong act with her, and that, at his request, the SHO PS Dwarka (South), along with W/Const. Kavita (PW-13) reached to the spot. He further deposed that, thereafter, he accompanied PW-13 and X to the Hospital, where X was medically examined and her statement was recorded by W/SI Ramwati (PW-19), who also reached the hospital. W/SI Ramwati (PW-19), thereafter, prepared the *rukka*, which was handed over to him (PW-18), using which he had the FIR registered at PS Dwarka (South). A copy of the FIR and the original *rukka* were handed over to W/SI Ramwati at the hospital.

18. In cross-examination, PW-18 Ghasi Ram accepted that M (PW-3) had stated that he was the boyfriend of X. He also acknowledged that he did not remember the time when W/Const. Kavita (PW-13) reached the spot at the Dwarka Sector-09 Metro Station, the time when they reached the hospital along with X, the name of the doctor who examined X, or the dress which X was wearing at that time. He further deposed that W/SI Ramwati reached the hospital at around 09:00 to 09:30 PM and recorded the statement of X, under Section 161 of the Cr.P.C. He further stated that the *rukka* was given to him at

about 10:30 PM and that he had returned to the hospital along with copy of FIR at 11:30 PM-12:00 midnight. He denied all suggestions to the effect that he was deposing falsely.

19. PW-9 ASI Manjeet Singh deposed that, at 11:10 PM on 26th February, 2013, he received the *rukka*, from the IO SI Ghasi Ram (PW-18), as sent by W/SI Ramwati (PW-19), and that, on the basis thereof, he got FIR No. 55/13 (Ex. PW-9/A) typed by Const. Harish Kumar. He endorsed the *rukka* (Ex. PW-9/B), by affixing his signatures thereon. He was not cross-examined, despite grant of opportunity

20. Const. Kavita, deposing as PW-13 confirmed having proceeded, with the I/O SI Ghasi Ram (PW-18) to the Metro Station at Dwarka Sector-9, on 26th February, 2013 in the evening, where they met X, alongwith her friend. She confirmed, further, that officials of the PCR were also present at the spot and that, from the spot, they took X to the hospital, where she was medically examined and brought back to the PS Dwarka South. In cross-examination, PW-13 confirmed that, after medically examining X, the doctor handed over, to her, 10 sealed *pullandas*, along with a sample seal, which she handed over to the IO (PW-18), and that the *pullandas* and the seal were taken into possession by the Police *vide* Seizure Memo Ex. PW-13/A, which bore her signatures. She also confirmed that X had related the incident to the doctors at the Hospital, in the presence of her parents.

21. W/SI Ramwati, deposing as PW-19, testified that, at 07:00 to 08:00 PM on 26th February, 2013, custody of X was handed over, to her, by SI Ghasi Ram (PW-18) and W/Const. Kavita (PW-13), along with the MLC of X and that she, thereafter, recorded the statement of X (Ex. PW-1/B), which bore her signature, and also prepared the *rukka* (Ex. PW-19/A), which she handed over to SI Ghasi Ram (PW-18). She also confirmed that, after registration of the case, PW-18 SI Ghasi Ram handed her the copy of the FIR and the original *rukka*. She further deposed that the custody of X was handed over to her parents. The exhibits relating to the prosecutrix X, which were handed over, to her, by W/Const. Kavita (PW-13) were seized by her *vide* Seizure Memo Ex. PW-13/A, and deposited in the *Malkhana*. PW-19 W/SI Ramwati further testified that, on 27th February, 2013, she was taken, by X, to the place from where the appellant had given her, and her friend M (PW-3), a lift in his car, the place from where the appellant had kidnapped her, as well as the place where the appellant had raped her, and that the site plans (Ex. PW-1/C, PW-1/D and PW-1/E) of the said spots, which bore her signature, were prepared by her, at the instance of X. W/SI Ramwati (PW-19) further deposed that the School certificate, with regard to the age of X, which was handed over to her by her parents, was verified from the Kendriya Vidyalaya, Vikas Puri, and that, as per the said certificate, X was 17 years of age. PW-19 further confirmed that, on 28th February, 2013, the statement of X was recorded, before the learned Metropolitan Magistrate, under Section 164 of the Cr.P.C.

22. Apropos the appellant, PW-19 W/SI Ramwati deposed that, on 11th March, 2013, she received secret information to the effect that the appellant would be arriving at the house of his maternal grandmother by car, the registration number of which was also provided by the informer. She confirmed that a raiding party was constituted, including herself, HC Kalu Ram, Const. Ranvir and Const. Roshan, which proceeded to the Bhartal Subway Bus Stop, accompanied by the secret informer. She confirmed, further, that, at around 10:30-11:00 PM, they noticed a Swift Dzire car coming towards the Bus stop, which, on being stopped by them, was found to be driven by the appellant. She testified, further, that the appellant was apprehended, at the instance of the secret informer and, after interrogation, was arrested vide Arrest Memo Ex. PW-16/A (which bore her signature), and his personal search conducted vide Memo Ex. PW-16/B (which also bore her signature). Intimation regarding the arrest of the appellant was communicated to his brother Rakesh. The car of the appellant was taken into possession *vide* Seizure Memo Ex. PW-19/B, and the appellant was sent to the DDU Hospital for his medical examination. After his medical examination, the appellant was brought to the PS Dwarka South by Const. Sandeep (PW-15), who handed over, to her, the exhibits and MLC of the appellant, which were taken into possession, by her, *vide* Seizure Memo Ex. PW-15/A, and deposited in the *Malkhana* on 12th March, 2013. She further confirmed that, on 12th March, 2013, the appellant was produced before the Court and remanded to judicial custody.

23. PW-19 W/SI Ramwati further confirmed, in her deposition, that the exhibits, which had been deposited in the *Malkhana*, as also the car of the appellant, were sent to the FSL by SI Sunil Godiyal (PW-20) on 14th March, 2013. She confirmed having prepared the charge sheet, consequent to completion of investigation, and having filed it in the court. She correctly identified the appellant, who was present in the court.

24. PW-17 HC Amar Chand confirmed, during trial, having deposited, in the *Malkhana*, (i) ten sealed *pullandas*, along with a sample seal, handed over to him by W/SI Ramwati (PW-19), on 26th February, 2013, *vide* serial no. 574 in register no. 19 (Ex. PW-17/A), (ii) the keys of the Swift Dzire car no. DL 9CAB 9463, two mobile phones and one wallet, containing a driving license and the registration certificate of the said car, along with ₹ 45/- in cash, which were handed over to him by W/SI Ramwati on 11th March, 2013, *vide* entry at serial no. 609 in register no. 19 (Ex. PW-17/B), (iii) four sealed *pullandas*, handed over to him, on 12th March, 2013, by W/SI Ramwati, *vide* entry no. 610 in register no. 19 (Ex. PW-17/C) and (iv) one sealed *pullanda*, given to him by SI Sandeep on 14th March, 2013, *vide* entry no. 616 in register no. 19 (Ex. PW-17/D).

25. He also confirmed, having handed over (i) twelve sealed *pullandas*, along with a sample seal, to W/SI Ramwati, on 1st March 2013, *vide* RC 19/21/13 (Ex. PW-17/E), which was deposited in the FSL by W/SI Ramwati, who handed over, to him, the acknowledgment (Ex. PW-17/F) in respect thereof, and (ii) two sealed

pullandas with sample seal, to Const. Ranbir Singh (PW-16) *vide* RC No. 26/21/13 (Ex. PW-17/G), which were deposited by Const. Ranbir Singh in the FSL and acknowledgment thereof handed over to him, *vide* Ex. PW-17/H.

26. PW-17 was not cross examined, despite grant of opportunity.

27. Const. Sandeep, deposing as PW-15, confirmed having proceeded with W/SI Ramwati (PW-19), HC Kalu Ram, Const. Ranbir and Const. Roshan to the Bus Stop at Barthal Village, on 11th March, 2013 at 09:30 PM and having apprehended and arrested the appellant at 10:15 PM. The appellant was, thereafter, taken, by them, to the DDU Hospital, at 11:30 PM for his medical examination whereafter he was brought to PS Dwarka (South). He confirmed that, at 12:00 noon, on the next day, i.e. 13th March, 2013, the appellant was again taken to the DDU Hospital for his medical examination, after which three sealed *pullandas*, along with sample seal, were handed over by the doctor to W/SI Ramwati (PW-19), which were taken into possession *vide* Seizure Memo Ex. PW-15/A. Thereafter, the appellant was produced before the learned Metropolitan Magistrate and remanded to judicial custody. He correctly identified the appellant who was present in court.

28. PW-15 was cross-examined by learned counsel for the appellant. He admitted that his signatures did not figure on the personal Search Memo, the disclosure statement of the appellant or the Seizure Memo dated 11th March, 2013.

29. Suggestions, to the effect that he has been deposing falsely, were denied by him.

30. PW-16 Const. Ranbir also testified, during trial, to be a member of the raid team constituted by W/SI Ramwati (PW-19) at 09:00 PM on 11th March, 2013, the other members of the team being Const. Sandeep (PW-15), Const. Roshan and HC Kalu Ram, and to the said team having apprehended and arrested the appellant at about 10:30 PM on the same day, *vide* Arrest Memo Ex. PW-16/A, and to his personal search having been conducted *vide* memo Ex. PW-16/B. He also deposed that the appellant had been taken, thereafter, to the DDU Hospital, by them, for his medical examination, whereafter they returned, with the appellant, to PS Dwarka (South). He further deposed that, at 11:00 AM on 12th March, 2013, the appellant led the raid team, comprising W/SI Ramwati (Pw-19), Const. Sandeep (PW-15), Const. Roshan and himself to the spot at E-24 at Pushpanjali, Bijwasan, New Delhi, where he had committed sexual assault on X, and pointed out the spot of occurrence *vide* Pointing Out Memo Ex. PW-16/C, which bore his signature. He also confirmed having taken the appellant, along with Inspector Sunil Godiyal (PW-20) to the FSL, Rohini, on 14th March, 2013, for having inspection of the car conducted and to the vehicle having been inspected by the experts at the FSL on the same date. He deposed that, from the vehicle, certain exhibits were resumed, which were taken into possession by Insp. Sunil Godiyal (PW-20), *vide* Seizure Memo (PW-16/D), whereafter they returned to PS Dwarka (South). He correctly identified the appellant who was present in court.

31. Nothing substantial emerged from the cross-examination of PW-16.

32. SI Sunil Godiyal, deposing as PW-20, confirmed having proceeded to the FSL with Const. Ranbir Singh (PW-16) on 14th March, 2013, for inspection of Car no. DL 9C AB 9463, and to having presented the car before Ms. Poonam Sharma, SSO, Biology Division, FSL Rohini, Delhi (who was not co-opted as a witness), who handed, to them, an envelope containing a piece of the rear seat of the car, *vide pullinda* sealed with the seal “SG”, which was seized, *vide* Seizure Memo Ex. PW-16/D, which bore his signature. He confirmed having returned to PS along with vehicle and having deposited the *pullinda* in the *Malkhana*. He was not cross-examined, despite grant of opportunity.

Witnesses who tendered Medical/Forensic Evidence.

33. These witnesses could be categorised into two categories, namely:

- (i) Hospital witnesses, namely, PW-8, Dr. Megha Batra, PW-10 Dr. Avnish Bhargava, PW-11 Dr. S. Renu Bala and PW-12 Dr. Dayanand, and,
- (ii) FSL witnesses, PW-6, Praveen, PW-7 Amit Bhanwala and PW-21 L. Babyto Devi.

Hospital Witnesses

34. Of the four hospital witnesses, the evidence of PW-8 Dr. Megha Batra and PW-12 Dr. Dayanand related to the appellant and, the evidence of PW-10 Dr. Avnish Bhargava and PW-11 Dr. S. Renu Bala related to the prosecutrix X.

35. Apropos the prosecutrix X, PW-10, who was deposing on behalf of Dr. Deepshikha, who had left the service of the hospital, stated that she identified the signature and handwriting of Dr. Deepshikha as he had seen her writing and signing in the course of her official duties. She proved the MLC No. 4649 dated 26th February, 2013, as having been prepared in the handwriting of Dr. Deepshikha and as bearing her signature. PW-10 was not cross-examined, despite grant of opportunity.

36. MLC No. 4649 (Ex. PW-1/A) dated 26th February, 2013, as prepared by Dr. Deepshikha, reads thus:

“Brought for medical examination.

O/E

Conscious/oriented.

P/R 70/min

BP 110/80 mm Hg

CVS – S₁S₂ (N)

Pupils – B/L NSNR

L/E – No fresh external injury present over the body on physical examination.

Refer to Gynae Deptt for further evaluation and expt opinion.

(‘X’) was accompanied by W/C Kavita (2244-SW).

(‘X’) D/o Neta Pal, Age 17, R/o Palam Colony accompanied by friend Mr (‘Y’) present with Alleged H/o sexual Assault by friend of Mr (‘Y’) (name – Raj Dikshit) at 4:00 p.m. on 26.2.13.

- Patient had gone to a friend’s house to collect some sample paper, when she was met by Mr Raj there. Mr ‘A’ was sent out on an errand when Mr Raj allegedly took patient out in car ride & taken to empty farmhouse, where she was Allegedly raped under threat of gang rape.
- h/o sexual intercourse today at 4:30 p.m. on 26/2/2013 f/b ejaculation.
- No h/o hitting/slapping.
- Since then clothes not changed. No washing since then.
- OH – nil. Menarche – 3 yr back.
- PNH – 4/2/13 PH/FH – n/s
- O/E – GC fair. AFeb. PR – 84/min. BP – 110/70 mm Hg. PA – soft.
- No ... Injury marks seen. Breast (N). No bruises.

L/E – No Abrasion/Injury mark

Matted pubic hair

White discharge (semen like discharge seen coming out)

Hymen old torn – No fresh bleeding seen.

Vagina intact – No tear.”

37. Evidence, in respect of MLC No. 4649 (Ex. PW-1/A) was also tendered by PW-11 Dr. S. Renu Bala, Sr. (OBG) in the hospital, on behalf of Dr. Ankita, who had left the service of the hospital. She deposed that she was well conversant with the handwriting and signatures of Dr. Ankita and had seen the MLC, exhibited as Ex. PW-1/A. She proved, on the said MLC, the report of Dr. Ankita, which bore her signature at point 'C' from the portion X to X.

38. In cross-examination, PW-11 confirmed that, in the MLC, Dr. Ankita had given a finding "hymen old torn, vagina intact (no tear)", and also confirmed that there were no external injuries on the person of the prosecutrix X, even on the private parts. She also confirmed that Dr. Ankita had taken the vaginal swab and vaginal smear of prosecutrix.

39. Apropos the appellant, PW-8 Dr. Megha Batra deposed that, on 12th March, 2013, the appellant had been brought to the hospital by Const. Sandeep (PW-15), where she examined him, and collected samples of his blood and semen, as well as his undergarments, which was sealed and handed over to IO. She confirmed that the MLC of the appellant, which was exhibited as Ex. PW-8/A was prepared by her and bore her signatures.

40. The comments of Dr. Rajiv Kumar, on the MLC of the appellant (Ex. PW-8/A), were also proved by PW-12 Dr. Dayanand, Sr. (Surgery) in the Hospital, who testified that Dr. Rajiv Kumar had worked with him for about a year and that he had seen him writing and

signing in the course of his official duties. PW-12 was not cross-examined, despite grant of opportunity.

41. The MLC No. 5938, dated 12th March, 2013, to the extent it is relevant, contained the following observations:

“L/E – No fresh external injury seen anywhere over the body.

There is nothing to suggest that the person cannot perform sexual intercourse.

Refer to Surg. Emerg. to R/o that the person is capable of performing sexual act.

C/S/B S.R. Surgery-II

- Pt referred from casualty for ME to see whether patient is capable of performing sexual intercourse.
- There is nothing to prove otherwise that person is incapable of performing sexual intercourse.”

FSL Witnesses

42. PW-6 Sh. Parveen, Lab Attendant at the FSL, Rohini deposed that, on 15th March, 2013, Const. Ranbir (PW-16) had arrived at the FSL and handed over two sealed *pullandas*. He was not cross-examined, despite grant of opportunity.

43. PW-7 Amit Bhanwala, Scientific Assistant, FSL, Rohini, similarly, deposed, during trial, that, as per the record as entered by Dharamveer Kapoor, Scientific Assistant in FSL, Rohini whose

handwriting and signature he could identify, 12 sealed parcels were received by Dharamveer Kapoor, on 1st March, 2013 from W/SI Ramwati (PW-19). He confirmed that Ex. PW-7/A was a photocopy of the acknowledgment given by the FSL, Rohini in this regard and bore the signature of Dharamveer Kapoor.

44. Ms. L. Babyto Devi, Assistant Director, Biology, FSL, Rohini, deposing as PW-21, confirmed having examined all the above fourteen parcels and prepared her report in respect thereof (Ex. PW-21/A). In cross-examination she confirmed that “semen could not be detected from the lady’s underwear, vaginal swab of the victim, vaginal smear of the victim, vulval swab of the victim, rectal swab of the victim, buccal swab of the victim, pubic hair of the victim, brassiere of the victim, and on the piece of the back seat of the vehicle”.

45. The report dated 1st November, 2013, (Ex-PW-21/A) of the FSL, Rohini certified that, though no semen could be detected on the underwear, the vaginal swab, the blood sample, the vulval swab, the rectal swab, the buccal swab, the brassiere or the cutting of the back seat of the vehicle No. DL 9C AB 9463, and no foreign biological material could be detected on the nail clipping of X, semen was detected on the ladies’ top and on the jeans which were being worn by X, exhibited as Ex PW-12/A and Ex PW-12/B, respectively.

46. DNA analysis of the said semen, *vis-a-vis* the blood of the appellant, was certified to be sufficient to conclude that “allele Data

from the source of “Ex-13” is accountant in the allelic Data from the source of Ex-12a and Ex-12b”. This clearly indicated that the semen of the appellant was found on the lady’s top and the jeans which were being worn by the prosecutrix X, at the time of the alleged incident.

Other Witnesses:

47. PW-3, the friend of X, who has been referred to, in this judgment, as M, deposed that, on 25th February, 2013, he had received a telephonic call from X, at 02:00 AM to meet her the next day and that, on 26th February, 2013, at about 09:00 AM he proceeded to the Metro Station at Sector-14, Dwarka, from where he, and his friend, Aditya, went to the Hanuman Temple, where they remained for half an hour. From there, they returned to the Dwarka Mor Metro station, where they remained for an hour, whereafter Aditya left for his home. M (PW-3) remained at the Metro Station with other friends till 01:30 PM whereafter he proceeded to Palam to meet X. When he had reached near Madhu Vihar, he had received a telephonic call from the appellant, and informed him that he was proceeding to meet X at Palam.

48. PW-3 further deposed that X reached the designated spot at Palam at about 02:15 PM. While they were waiting at the bus stand, he received a call from the appellant at about 02:30 PM. He deposed that the appellant asked them to remain at the spot, from where he would come to pick them up, and that, about 10 to 15 minutes later, the appellant reached the spot, in his Swift Dzire car along two

friends. M (PW-3) further deposed that he, and X, requested the appellant to drop them at the Metro Station at Sector-9, Dwarka. The appellant, thereafter, dropped his two friends at different spots and, on the way to Sector-9 Dwarka, stopped at a wine and beer shop at Sector 20, Dwarka, from where the appellant bought two bottles of beer, both of which he consumed. They thereafter proceeded to Sector-9 Dwarka, *en route* whereto the appellant stopped the car in front of a Maruti Showroom. M (PW-3) further deposed that the appellant requested him to call a boy named Narender from inside the showroom and that he, “i.e. M proceeded to the showroom, asking X to remain in the car.” He further confirmed that, in the showroom, he met Narender and received a call from the appellant, who wanted to speak to Narender. The appellant, thereafter, talked to Narender on the mobile phone of M. Narender asked him to wait in the showroom for 5 to 10 minutes as the appellant was coming after reversing the car. However, as the appellant did not turn up for over 10 minutes, he called the appellant on his mobile phone. The call was answered by X, who informed him that the appellant had taken her to his house to get some cards. M deposed that, during the next 30 to 35 minutes, he tried the appellant’s phone several times, but it was switched off, and that, in the circumstances, he called the police by dialing “100”. He stated that the police reached the spot, and while they were waiting there, he received a call from X, who informed him that she had been dropped by the appellant at Palam Village. The police refused to bring X from Palam Village, whereupon he, i.e. M (PW-3), called his friend Aditya (PW-2), who reached the spot on his Scooty and proceeded, therefrom, to Palam, to pick up X, with whom he returned in about half an hour. He

deposed that X was crying and that, on inquiry by the “ACP madam”, X narrated what had transpired with her. Thereafter, he stated, X had been taken to the DDU Hospital for medical examination and that he, too, proceeded to the DDU Hospital, where he met X and her brother. X was medically examined at the DDU Hospital, whereafter they returned to the Police Station Sector-9, Dwarka, where his statement, exhibited as Ex. PW-3/DA, under Section 161 of the Cr.P.C. was recorded. M correctly identified the appellant, who was present in court.

49. In cross-examination, M deposed that he had met X through PW-2 Aditya. He testified to having, in his statement (Ex. PW-3/DA *supra*) under Section 161 of Cr.P.C. stated various things which were actually not to be found in the said statement with which he was, accordingly, confronted. He also confirmed that, on 26th February, 2013, he had did not have any fight or altercation with anyone, and that he had not made any PCR call alleging abduction, kidnapping or any kind of quarrel, but had merely sought help. He also confirmed that he had not made any call to the parents of X, informing them regarding the incident and that, when he had spoken to X on the mobile phone of the appellant, she was not crying. He denied the suggestion that X had introduced him to the doctors in the DDU Hospital, as her boyfriend. He also denied having, in his statement under Section 161 of Cr.P.C (Ex. PW-3/DA), informed the police that he had proposed to X, and that she had agreed, though he had, in fact, so stated in the said deposition. He denied the suggestion that he had taken a loan of ₹ 10,000/- from the appellant or that he had falsely

implicated the appellant, in connivance with X, in order to avoid having to pay back the said loan.

50. Deposing as PW-2, Aditya Panwar, a friend of M (PW-3), testified that, at about 05:30 PM on 26th February, 2013, he received a call from M asking him to reach the Metro Station at Sector-9 Dwarka and that he proceeded, on his Scooty, to the said spot, where he found M and the PCR officers. M informed him that, he along with X and the appellant, had travelled, in a car, to the Maruti showroom at the Metro Station at Sector-9 Dwarka, where M was dropped by the appellant who proceeded, therefrom, in his car with X. He further confirmed that, about half an hour after he had reached there, M received a call, on his mobile phone, from X. He further stated that, though M informed the officials in the PCR that X had called him and was waiting under the Palam flyover, the police official did not allow him to leave the spot, but, instead, asked him i.e. PW-2, to pick up X. Accordingly, PW-2 Aditya picked her up on his Scooty and brought her to Sector-9 Metro Station Dwarka, where he handed over X to the PCR officials and returned home.

51. In cross-examination, PW-2 Aditya stated that he was not aware whether X was the girlfriend of M (PW-3), who had never so informed him. He only knew that X and M were good friends and used to go together. He confirmed that M had not informed him on the phone that the appellant had fled with X. He also confirmed that when he picked up X on his Scooty, she was constantly weeping but did not inform him what had happened and that, he, too did not enter

into any conversation with X. He further confirmed that he, and X had reached the Sector-9 Metro Station at around 6:00 PM. He affirmed that no statement of X was recorded by the police in his presence. He denied the suggestion that he had not gone to pick up X from the Palam flyover or that she was already present with M at the time when he had reached the Sector-9 Metro Station.

52. Mr. Narender Sharma, Team Manager with Magic Auto Maruti Showroom, Sector-9 Dwarka, deposed as PW-14. He confirmed knowing the appellant, as he had purchased a Swift Dzire VDI car from him 4 to 5 years back and having visited his showroom on various occasions thereafter. He also confirmed that, in February, 2013, M had visited his showroom with a girl and asked him to show the same vehicle as that which had been purchased by the appellant, whereupon he showed a Swift car to them.

53. On the same day, certain police officials came to his showroom and took him, with them, to the police station Dwarka, where he remained till 4:00 PM the next day. He correctly identified the appellant who was present in court.

54. In cross-examination, PW-14 denied the suggestion that, on 26th February, 2013, M was not accompanied by any girl when he visited his showroom. He referred to his statement dated 26th February, 2013, recorded under Section 161 of Cr.P.C., which was, accordingly, exhibited as Ex. PW-14/A.

55. Mr. D.S Rana, Yoga Teacher, Kendriya Vidyalaya, Vikas Puri, where X was studying, deposing as PW-5, brought, with him, the record, pertaining to X, according to which, X had been admitted in Class I in the Kendriya Vidyalaya, Vikas Puri, on 14th March, 2001 and according to which her date of birth was 14th October, 1995. The admission form filled in by X at the time of securing admission in the school was exhibited as Ex. PW-5/A. The admission form reveals that the date of birth of X has been entered, therein, as “14.10.1995”.

56. Ms. Manu Vedwan, learned MM, deposing as PW-4, confirmed that, on 28th February, 2013, the statement of X was recorded under Section 164 of the Cr.P.C, and was exhibited as Ex. PW-1/F.

57. After the statement of the prosecution witnesses were recorded, as hereinabove, the statement of the appellant was recorded under Section 313 Cr.P.C. The appellant merely denied, flatly, all allegations, against him or professed ignorance regarding the same. However, he confirmed the fact that his medical examination, by PW-8 Dr. Megha Batra *vide* MLC (Ex. PW-8/A), and by Dr. Rajeev, as well as the taking of exhibits, in relation to him, into possession, *vide* Seizure Memo Ex. PW-5/A, were a matter of record. He alleged that X had falsely implicated him in connivance with M (PW-3) and the IO and that the case being sought to be made out against him was false. He also alleged that M (PW-3), the boyfriend of X, had borrowed ₹ 10,000/- from him and was not returning the amount despite his constant requests. It was for this reason, alleged the appellant, that M (PW-3) had falsely implicated him through X, who was his girlfriend.

The appellant also stated that he did not desire to lead the evidence of any defence witness.

Statement of X under Section 164 Cr.P.C.

58. X stated, in her statement, under Section 164 Cr.P.C, recorded, on 17th August, 2013, that (i) on 26th February, 2013, at 02:00 PM, she was proceeding to attend her tuition class, and contacted M (PW-3), on his mobile, as some of her books were with him, (ii) they agreed to meet at the Palam flyover, from where she would proceed for her tuition class after taking her books, (iii) they met at the Palam flyover, but M (PW-3) informed her that he had forgotten her books in his house, (iv) while they were waiting to catch a bus, to proceed to the house of M (PW-3), M received a call from one of his friends whom, she later learnt, was Raj Dixit, (v) Raj Dixit informed them that he was near Palam flyover and offered to drop them at the house of M (PW-3), (vi) Raj Dixit arrived at the spot in a Swift Dzire car, which was being driven by him, with two of his friends, (vii) Raj Dixit offered to drop them to M's house after dropping his friends, (viii) Raj Dixit, thereafter, dropped his friends at different spots and after driving for sometime, stopped the car at a spot, where he alighted, stating that he had some work to do and would return in five minutes, (ix) during the said time, she remained in the car with M, (x) thereafter, Raj Dixit took them to another spot, from where he bought two bottles of beer and juice, (xi) Raj Dixit had the beer whereas M and X shared the juice, (xii) thereafter, Raj Dixit drove them to a Maruti Showroom at Sector-9 Dwarka, where he requested M (PW-3) to call his friend Narender, (xiii) as soon as M (PW-3) proceeded to

the showroom, Raj Dixit started the car, (xiv) on her asking Raj Dixit as to why he was driving away, Raj Dixit responded that he had forgotten his debit card at his house and was going to get it, (xv) Raj Dixit also rang up M (PW-3) and told him that he was going to get his debit card, (xvi) he again rang up M (PW-3) and requested to speak to Narender, to whom he stated that he would be returning within five minutes during which period he requested Narender to serve a cup of coffee to M (PW-3), (xvii) after driving for some time, he asked her to kiss him, to which she refused, and requested him to take her to M (PW-3), as she desired to return home (xviii) Raj Dixit threatened her that they were in his area and that he could call 8-10 people who would gang rape her and film the act, offering, in the alternative, that, she should have sex with him, (xix) she, thereupon, opened the door of the car and ran, (xx) Raj Dixit shouted, to her, that 8-10 persons would reach there and would drag her to the area and have sex with her, (xxi) as she had forgotten her bag in the rear seat of the car, she returned to the car to retrieve the bag, whereupon Raj Dixit pushed her, and threw her onto the rear seat of the car, (xxii) though she tried to flee, she was prevented from doing so by Raj Dixit, who locked the car, (xxiii) on her attempting to open the rear door, Raj Dixit again threatened to call his friends who would gang rape her and film the act, (xxiv) he repeatedly threatened her and abused M (PW-3) being of no worth, (xxv) he, thereafter, disrobed, pulled off her jeans and forcibly raped her, (xxvi) she kept crying and, while crying, put on her jeans and requested the appellant to drop her home, (xxvii) the appellant, thereafter, threatened to show her a porn movie and repeat the act, upon which she cried even more, whereupon the appellant offered to

pay her money if she needed it, (xxviii) she stated that she was not in need of anything except to be dropped home, (xxix) the appellant dropped her at the Palam flyover and she called M (PW-3), (xxx) on M's asking her whether she was alright, she answered in the negative, (xxxi) M (PW-3) informed her that he would be sending his friend Aditya (PW-2) and was also calling the police, (xxxii) Aditya arrived at the spot and took her back to A who was in the company of the police and (xxxiii) she got to know that Raj Dixit's real name was Pravesh Dixit @ Tinda, and that he belonged to village Bijwasan. She stated that she had nothing further to add.

The Impugned Judgment and Order on Sentence

59. Following on the above evidence, the Learned ASJ has, in para 21 in his findings in the impugned judgment (which, essentially, commence from para 21 thereof), held that, as X was below 18 years of age, and the fact of her having been subjected to “penetrative sexual assault” by the appellant, stood established by the evidence as well as the FSL report, the ingredients of Sections 342 and 367 of the IPC stood satisfied. He has also held that the evidence of PW-5 D. S. Rana, and the records produced by him, indicated that X was admitted in Class-I in Kendriya Vidyalaya, Vikas Puri on 14th March, 2001, and that, as per her admission form, the date of birth of X was 14th October, 1995, thereby rendering her 17 years and 4 months of age on the date of the commission of the offence i.e. 26th February, 2013. The testimony of X having remained uncontroverted, the fact of her being a “child”, within the meaning of the POCSO Act, stood established. The evidence of Dr. Avinash Bhargava (PW-10), Dr. S. Renu Bala

(PW-11) and Dr. Dayanand (PW-12), further proved the fact that the petitioner was subjected to “penetrative sexual assault”. This evidence, read with the testimony of PW-1 (X), PW-2 (Aditya Panwar) and PW-3 (M), seen in conjunction with PW-3/DA, proved the sequence of events leading to abduction, and subsequent rape, of X, by the appellant. The cumulative medical and forensic evidence, therefore, it has been held by the Learned ASJ, converged, to bring home, to the appellant, the charge of having committed “penetrative sexual assault” on X, within the meaning of Section 4 of the POCSO Act.

60. In view thereof, the Learned ASJ has held the commission, by the appellant, of the offences under Section 367/342 IPC and Section 4 of the POCSO Act, to stand proved.

61. *Vide* subsequent order dated 27th April, 2017, the Learned ASJ has sentenced the appellant to 10 years’ RI for commission of the offence under Section 4 of the POCSO Act, 7 years’ RI for the offence under Section 367 IPC and 1 year’s RI for the offence under Section 342 of the IPC, with fines and default sentences as set out in para 1 *supra*.

Submissions at the Bar

62. Arguments have been advanced, on behalf of the appellant, by Mr. K. Singhal, and on behalf of the State by Mr. G.M. Farooqui, learned APP.

63. Arguing on behalf of the appellant, Mr. Singhal has advanced the following submissions:

(i) The finding that X was less than eighteen years of age was erroneous, and unsupported by sufficient evidence. The only document, in support of the said finding, was the admission form of X, at the time of her securing admission in Class I in the Kendriya Vidyalaya, Vikas Puri, and the date of birth of the prosecutrix X as entered therein, i.e. 14.10.1995. Reliance was placed on the judgment of the Supreme Court in *Jarnail Singh v. State of Haryana, (2013) 7 SCC 263*, to contend that this document was insufficient as proof of age of 'X'. Mr. Singhal further sought to point out that a reading of the aforesaid application (Ex. PW-13/A) indicated that the Kendriya Vidyalaya, Vikas Puri, was not the first school attended by the appellant but that she had earlier studied in the AF Vidya Mandir.

(ii) In view thereof, Mr. Singhal would seek to contend that the finding that the appellant was less than eighteen years of age was unsubstantiated by requisite evidence and could not, therefore, sustain.

(iii) The version of the prosecution indicated that X was roaming in the car with the appellant for about two hours, from 02:00 PM to 04:00 PM, which indicated that she was not as innocent as she made herself out to be.

(iv) There was discrepancy in the version of the prosecutrix, as noted in the body of her MLC (Ex. PW-1/A), *vis-à-vis* her statement under Section 161 of the Cr.P.C (Ex. PW-1/B). Moreover, the MLC indicated that there was no injury, that the hymeneal tear suffered by the petitioner was old and that no semen was found on her body, or on her undergarments. There was no allegation of usage of condom. Semen was found on the jeans which were being worn by X as well as on her handkerchief, which indicated that X herself wiped off the semen.

(v) A perusal of the statement of the prosecutrix X, under Section 161 Cr.P.C., revealed that she had referred to two boys, who were travelling with the appellant, at the time when he arrived, for the first time, at the Palam flyover. No attempt was, however, made to examine either of the said passengers.

(vi) Mr. K. Singhal, learned counsel for the appellant, next invited my attention to the statement (Ex. PW-1/F) of the prosecutrix X, recorded under Section 164 of Cr.P.C., in respect of which he advanced the following submissions:

(a) He contended that, in the said statement, the prosecutrix stated that the appellant had shown her, and M (PW-3), his village house, yet she was unable to state the place of incident during investigation. This, he submitted, was difficult to believe.

(b) X admitted, in the said statement, that the appellant had pointed out, to M (PW-3), the button inside the car, using which the door of the car could be opened from within. The prosecutrix was, therefore, well aware of the fact that, by pressing the said button, the car door could be opened. Her statement, to the effect that she was trapped inside the car and was unable to open the door, could not, therefore, be believed.

(c) Though the statement alluded to a call having been made, by the appellant to Narender, stating that he would be returning in five minutes and requesting Narender, to, during the said time, serve coffee to M (PW-3), no call detail records were either produced or relied upon.

(d) The statement, of X, to the effect that she opened the car and fled, and, thereafter, returned to the car to retrieve her bag, was highly improbable, especially given the nature of the threats, which, according to her, were given to her by the appellant prior thereto, including the threat to have her gang raped and having the act filmed.

(vii) My attention was next invited to the deposition of X, during trial, in which she stated that the appellant asked her to call M (PW-3) and inform him that they had come to the appellant's house to collect his debit card and would return in

10 to 15 minutes. Mr. Singhal pointed out that, in contradistinction, the other statements were to the effect that M (PW-3) had made the said call to the appellant, whereupon he was informed that they would be returning in 10 to 15 minutes. This, again, he submitted, was a patent discrepancy, which discredited the case of the prosecution.

(viii) In her cross-examination, X herself admitted that her MLC (Ex. PW-1/A) was wrongly recorded and that she had visited the house of M, whereas she had never done so. She, in fact, expressed surprise as to how it was so recorded in her MLC.

(ix) In the face of these contradictions, Mr. Singhal would contend that the evidence of prosecutrix was insufficient to constitute the sole basis of conviction.

(x) The testimony of Aditya Panwar (PW-2) was totally silent regarding any complaint having been made by the prosecutrix about sexual assault having been committed on her. This, again, was unusual, especially considering that Aditya Panwar (PW-2) was the first person met by her after the alleged commission of the assault, who picked her from the Palam flyover and with whom she went to the police station.

(xi) Mr. Singhal next referred to the statement dated 26th February, 2013 of M (PW-3), under Section 161 of Cr.P.C. (Ex. PW-3/DA), in which it was recited that the appellant had

threatened the prosecutrix X with a gun, and that he had threatened her to eliminate her as well as M (PW-3) in case she disclosed, to them, what transpired, whereas there was no such allegation in any of the statements of the prosecutrix X.

(xii) The above facts, according to Mr. Singhal, indicated that X was a consenting partner in the entire act. As X was over 16 years of age, no charge of rape could be fastened against his client.

(xiii) There had been no identification of the crime scene.

(xiv) The finding, of the learned ASJ, in para 21 of the impugned judgment, to the effect that X “was subjected to unnatural lust of the accused”, could not, therefore, sustain. In this context, Mr. Singhal has invited my attention to clause “thirdly” and “fourthly” in Section 100 of the I.P.C., which deals with the right of private defence. Section 100 may, for ready reference, be reproduced thus:

“100. When the right of private defence of the body extends to causing death.—The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

(First) — Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(Secondly) —Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(Thirdly) — An assault with the intention of committing rape;

(Fourthly) —An assault with the intention of gratifying unnatural lust;

(Fifthly) — An assault with the intention of kidnapping or abducting;

(Sixthly) — An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.”

In the present case, Mr. Singhal would submit that it could not be said that his client assaulted X with the intention of committing rape or gratifying unnatural lust, as there was no unnatural lust in the first place.

(xv) Mr. Singhal next submitted that “assault” necessarily predicated application of criminal force with knowledge that the force was being applied on a child. He submits that no such knowledge could be attributed to the appellant, especially as the prosecutrix X was 17 years and 4 months of age on the date of commission of the alleged offence.

(xvi) Lastly, Mr. Singhal would seek to submit that the punishment imposed on his client by the Learned ASJ is disproportionate to the act committed by him.

64. Arguing in opposition, Mr. G.M. Farooqui, learned APP for the State, sought to discredit the submission, of Mr. Singhal, regarding the age of the prosecutrix X, by contending that the age of X stood proved by the Admission Form entered by her at the time of admission to Class I in the Kendriya Vidyalaya, Vikas Puri, read with the statement of PW-5 Sh. D.S. Rana, who was not cross-examined. The question of consent, Mr. Farooqui would submit, did not arise, as the prosecutrix X was a minor. Mr. Farooqui also highlighted the fact that the entire incident had taken place at a lonely area, under severe threat held out by the appellant, so that X was in no position to raise any objection. Insofar as the contradictions in the evidence, to which Mr. Singhal had sought to allude, were concerned, Mr. Farooqui would submit that minor contradictions, here and there, did not detract from the overall value of the evidence, comprehensively analysed. He also sought to submit that the prosecutrix X could hardly be expected to narrate the incident to Aditya (PW-2) when he came to pick her up, as he was a complete stranger.

Analysis

65. The appellant was charged with, and convicted of, having committed the offence contemplated by, and punishable under Section 342 and 367 of the IPC, and Section 4 of the POCSO Act.

Re. Section 4 of the POCSO Act

66. Obviously, by invocation of Section 4 of the POCSO Act, the possibility of invocation of any of the provisions of IPC stood ruled out in view of Section 42 of the former statute, which reads thus:

“42. Alternate punishment. - Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

67. Section 4 of the POCSO Act contemplates punishment of persons who commit “penetrative sexual assault”. “Penetrative sexual assault” is, in turn, defined in Section 3 of the POCSO Act in the following terms:

“3. Penetrative Sexual assault – A person is said to commit “penetrative sexual assault” if -

(a) he penetrates his penis, to any extent into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent any object or a part of the body, not being the penis into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person”

68. A person can, therefore, be said to have committed “penetrative sexual assault” for the purpose of Section 4 of the POCSO Act, only if such assault is committed on a child, or if a child is made, by the accused, to do such act, with him or with any other person. In either case, the victim of the offence has to be a “child”.

69. In the present case, the allegation, against the petitioner, is of having committed “penetrative sexual assault” on X. For the purposes of Section 4 of the POCSO Act, the aspect of whether the assault, on the victim, was against the will, or consent, of the victim, is completely irrelevant. So long as the commission of “penetrative sexual assault”, on a “child”, is established, Section 4 of the POCSO Act would apply.

70. The appellant has sought to contend that the evidence available was insufficient to make out a case for commission of “penetrative sexual assault”, by the appellant, on X.

71. In her statement, under Section 164 of the Cr.P.C. (Ex. PW-1/F), X has clearly stated that the appellant pushed her onto the rear seat of the car, locked the doors, threatened her with gang rape and,

after removing the prosecutrix's jeans, committed rape on her. It is significant that the words used, by the prosecutrix X, in the said statement, referring to the said act, are "*balatkaar kiya*", i.e. "committed rape", rather than any euphemistic expression such as "*galat kaam*". The prosecutrix, therefore, categorically and unequivocally alleged commission of rape, on her, by the appellant, in her statement under Section 164 of the Cr.P.C. Further, the fact that the M engaged in "penetrative sexual intercourse", with the prosecutrix X, is also borne out from her cross-examination, during which she stated that "it was incorrect to suggest that (she) had ever *done sexual intercourse* prior to the date of offence"

72. To this extent, the statement of the prosecutrix X, under Section 164 of the Cr.P.C., and her testimony during trial, are completely in sync. In her testimony, during trial, too, the prosecutrix X, deposing as PW-1, as stated thus:

"I pleaded with the accused to allow me to go as I have to prepare for my examination but he kept on insisting that I should have sex with him once and he will keep me happy. Thereafter accused again forcibly tried to open my jeans and he managed to pull down my jeans. Thereafter, accused raped me."

73. Though, therefore, the prosecutrix X was unequivocal in alleging, both in her statement under Section 164 of the Cr.P.C., as well as in her testimony during trial, that the appellant had raped her, no suggestion, to the effect that the act, if any, committed by the appellant on her did not tantamount to "rape", was put to her; neither were any questions put to her, as would give the lie to the notion that

the appellant had, in fact, committed penetrative sexual assault on the prosecutrix X.

74. Mr. Singhal has sought to rely on the fact that no attempt was made to secure the evidence of the two boys who were travelling, with the appellant, in his car. Nothing much can turn on this lacuna – if it could be called one – as, while analysing the evidence available, what has to be seen is whether the evidence marshalled by the prosecution was sufficient to sustain the charge against the accused, and not whether any further evidence could have been relied upon by it. The other alleged incongruities/discrepancies, apropos the statement of the prosecutrix X under Section 164 of the Cr.P.C., to which Mr. Singhal had sought to draw attention, i.e. the inability of the prosecutrix X to state the place of incident, while she remembered the fact that the appellant had shown, to her, his village house, the fact that she knew how to open the car, the absence of call detail records, and the returning, by the appellant, to the car, to retrieve her bag, cannot militate against the physical fact of “penetrative sexual assault” having been committed, on the prosecutrix X, by the appellant. They do not, therefore, detract from the value of the statement of the prosecutrix X, as recorded under Section 164 of the Cr.P.C., read with her testimony during trial, so far as fact of commission of “penetrative sexual assault”, on the prosecutrix, by the appellant, is concerned.

75. I may hasten to clarify, at this juncture, that, at this point, I am dealing with the issue of whether the evidence was sufficient to make out a case of commission of “penetrative sexual assault”, by the

appellant, on X, and not on whether the appellant could be said to have “raped” X. The aspect is being considered in the light of the provisions of the POCSO Act, and not in the backdrop of the IPC. The POCSO Act makes no reference to “rape”, but refers, instead, to “penetrative sexual assault”. “Rape”, as defined in Section 375 and 376 of the IPC, is a distinct and separate offence, though there is, undoubtedly, considerable overlap between the two. I would be dealing, separately, with the aspect of “rape”, read with Sections 375 and 376 of the IPC and my observations/findings, this juncture, are to be treated as limited to the issue of whether the charge of commission of “penetrative sexual assault”, as a physical fact, by the appellant on the prosecutrix X, stood proved, or not. While examining this aspect at this point, I am also not entering into the issue of age of the prosecutrix, to which I would allude a little later.

76. Insofar as the MLC of the prosecutrix X is concerned, clearly, it supports the case of the prosecution, rather than that of the appellant, *qua* the allegation of commission of “penetrative sexual assault”, by the appellant on the prosecutrix X. The fact that the MLC states that the hymen of the prosecutrix X was “old torn”, with no fresh bleeding, is neither here nor there, given the fact that the prosecutrix was 17 years of age, and could have ruptured her hymen for a variety of reasons, by that age. Likewise, it is not necessary that every case of “penetrative sexual assault” should result in bleeding or tear in the vagina. A reading of the MLC discloses that it clearly states that the pubic hair of the prosecutrix X was “matted”, and that there was a white, semen -like discharge coming out of her vagina. It is also

proved, by the report of the FSL (Ex. PW-21/A), that the appellant's semen was found on the jeans which was being worn by the prosecutrix X (prior to the assault) as well as on her handkerchief. The submission, of Mr. Singhal, to the effect that the presence of semen on these two items, goes to indicate that the semen was wiped off by the prosecutrix herself, even if accepted, would not discredit the reality that there was ejaculation, by the appellant, on the said occasion. This court cannot close its eyes to the fact that the incident had taken place on the rear seat of a car, in a cramped space. In such circumstances, the presence of the appellant's semen, on the jeans and the handkerchief of the prosecutrix X, read with the medical evidence, to the effect that there was a white, semen-like discharge coming out of her vagina, and the evidence of the prosecutrix, under Section 164 of the Cr.P.C. and, subsequently, during trial are, in my view, more than sufficient to establish the commission, by the appellant, of "penetrative sexual assault", on the prosecutrix X. This Court has, in its recent decision, dated 29th April, 2019, in ***Jitender Sharma v. State, 2019 SCC Online Del 8266***, examined the law on the subject, in considerable detail, while concluding that, in the case of commission of "penetrative sexual assault" on a child, the statement of the child prosecutrix can constitute the sole evidence for conviction. The order of the Supreme Court in ***Ram Ishwar Rai v. State of Bihar, MANU/SC/1650/2017***, is to the same effect, opining, clearly, "law is well settled that the sole uncorroborated testimony of prosecutrix can be accepted if it is beyond reproach".

77. The submission of Mr. Singhal, to the effect that no “penetrative sexual assault”, on the prosecutrix X, had been committed by his client, i.e. the appellant is, therefore, rejected.

78. The commission of the physical fact of “penetrative sexual assault”, however, does not satisfy the requirements of Section 4 of the POCSO Act, or constitute, solely on the basis thereof, an offence under the said provision. It has also to be established that the offence has been committed on a “child”.

79. “Child” is defined in clause (d) of Section 2 of the POCSO Act as meaning “any person below the age of eighteen years”. Section 2 (2) of the POCSO Act, clarifies that the words used therein, but not defined therein, but which are defined in the IPC, Cr.P.C. and the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as “the JJ Act”) and the Information Technology Act, 2000 shall have the meanings respectively assigned to them in the said Codes or Acts. I may note, here, that though the JJ Act stands repealed by the The Juvenile Justice (Care and Protection of Children) Act, 2015, it would be the 2000 JJ Act which would apply in the present case, being the act in force at the time of commission of the offence.

80. In *Mahadeo S/o Kerba Maske v. State of Maharashtra*, (2013) 14 SCC 637 - which has been followed, thereafter, in, *inter alia*, *State of Madhya Pradesh v. Anoop Singh*, (2015) 7 SCC 773 - it was held, by the Supreme Court, that Rule 12(3) of the Juvenile Justice(Care and

Protection of Children) Rules, 2007 (hereinafter referred to as the “JJ Rules”), was applicable in determining the age of the victim of rape.

Rule 12 (3) of the JJA Rules reads thus:

“(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining —

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

81. A reading of Rule 12(3) of the JJ Rules, read with the judgments in *Mahadeo (supra)* and *Anoop Singh (supra)*, indicates that the evidence, on the basis of which the age of a child victim of rape, is to be determined is (i) the matriculation or equivalent certificate, if available, (ii) in the absence thereof, the date of birth certificate *from the school first attended*, and (iii) in the absence thereof, the birth certificate given by a corporation or a municipal authority or a panchayat. If none of these documents are available, it is permissible to rely on medical opinion, which has to be obtained from a duly constituted medical board, entrusted with the duty of declaring the age of the juvenile or child.

82. In the present case, neither is the matriculation certificate of X, nor the date of birth certificate from the school first attended by her, nor is the birth certificate of any corporation, municipal authority, or Panchayat, exhibited, before the Learned ASJ. The only evidence, on which the Learned ASJ has relied, is the date of birth of the petitioner as entered in the admission form, submitted at the time of her admission in the Kendriya Vidyalaya, Vikas Puri. Learned counsel for the appellant is undoubtedly justified in pointing out that a glance at the said admission form (Ex.PW-5/A) itself discloses that the Kendriya Vidyalaya, Vikas Puri was not the school first attended by the appellant, as she had, prior thereto, being studying in the AF Vidya Mandir.

83. In view thereof, none of the categories of evidence contemplated by Clause (a) of Rule 12(3) of the JJ Rules is exhibited,

before the Learned ASJ, in the present case, so as to enable a conclusive identification of the age of the prosecutrix X.

84. Even on the MLC of the X, the age of 17 years, as entered, does not appear to be the result of any scientific or legally acceptable examination or test. It needs to be borne in mind that the present case is not one in which the prosecutrix was of an age which would make it apparent that she was below the statutory age of eighteen, stipulated in the POCSO Act. Where the age of the victim is between seventeen and eighteen years of age, invocation of the POCSO Act would be justified only if there is clinching evidence, as contemplated by the Rule 12(3) of the JJ Rules, to the effect that the victim is less than 18 years of age.

85. The Learned ASJ, on this aspect, holds that, in view of the date of birth entered in the admission form of the prosecutrix, read with the evidence of PW-5, there could be no dispute regarding the age of the prosecutrix. This finding, obviously, cannot sustain, in view of the legal position enunciated in *Mahadeo (supra)* and *Anoop Singh (supra)*, which requires the issue to be examined in the light of Rule 12(3) of the JJ Rules. The Learned ASJ, clearly, has not done so. Examining the issue in the light of Rule 12(3) of the JJ Rules, there is, on the face of it, no conclusive evidence, to indicate that the prosecutrix X was less than eighteen years of age at the time of her alleged sexual assault by the appellant. That being so, the conviction, of the appellant, under the POCSO Act, cannot be said to be justified,

on the basis of the material exhibited before the Learned ASJ, and on which he has chosen to place reliance.

86. At the same time, I find, among the documents which were filed with the charge sheet but were not exhibited during the proceedings before the Learned ASJ, a Secondary School Examination Certificate Roll No. 8171942, of the prosecutrix X, indicating her date of birth as 14th October, 1995, as well as a Certificate, issued by Gaurav Saxena, an Officer in the “AMSE, AF”, certifying that the date of birth of X, as per the service document held by the said unit, was 14th October, 1995. For some inscrutable reason, these documents, which are of primal significance while deciding the applicability, to the present case, of the provisions of the POCSO Act, were neither exhibited nor proved. While it baffles comprehension as to why these documents were never exhibited by the prosecution before the Learned ASJ, the said default cannot be permitted to be used as a windfall in favour of the appellant – if, in fact, he is guilty of commission of the offence contemplated by Section 4 of the POCSO Act. I am of the view that, in the circumstances, the Learned ASJ has to be directed to exhibit the said documents (figuring at pages 305 and 309 of the record of the Learned ASJ) and, thereafter, provide, to the prosecution, a chance to prove the said documents (should they so choose to do), as well as the defence an opportunity to disprove the same. The Learned ASJ would be required to strictly abide by Rule 12(3) of the JJ Rules. It is only thereafter that a decision could be taken, one way or the other, as to whether the prosecutrix X was, or was not, less than 18 years of age on the date of commission of the alleged offence of sexual assault, on

her, by the appellant and, consequently, whether the provisions of the POCSO Act would, or would not, apply.

87. While, therefore, affirming the finding, of the Learned ASJ, to the effect that assault, within the meaning of Section 3 of the POCSO Act has, in fact, been perpetrated, by the appellant on the prosecutrix X, the decision, on whether such assault would tantamount to “penetrative sexual assault”, punishable under Section 4 of the said Act, would necessarily depend on a conclusive finding, regarding the actual date of birth of the prosecutrix. It would be necessary, therefore, for the Learned ASJ to undertake this exercise, after exhibiting the two documents referred to in para 81 *supra*, and assessing their evidentiary value, also in the light of the other material available on record.

88. There is another aspect of the matter. Even if the appellant were to be acquitted of the offence under Section 4 of the POCSO Act, it would still remain to be considered as to whether he would be guilty of the offence under Section 376 of the IPC, which has been invoked in the FIR (Ex. PW-9/A), but finds no mention in the charge sheet issued to the appellant.

89. Sections 375 and 376 of the IPC read thus:

“375. Rape. — A man is said to commit “rape” if he-
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or

anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First. — Against her will.

Secondly. — Without her consent.

Thirdly. — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. — With or without her consent, when she is under sixteen years of age.

Seventhly. — When she is unable to communicate consent.

Explanation 1. — For the purposes of this section, “vagina” shall also include *labia majora*.

Explanation 2. — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. —A medical procedure or intervention shall not constitute rape.

Explanation 2. — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

“376. Punishment for rape. —

(1) Whoever, except in the cases provided for in subsection (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever—

(a) being a police officer, commits rape,
(i) within the limits of the police station to which such police officer is appointed;
(ii) or in the premises of any station house; or
(iii) on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or

- (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
- (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
- (g) commits rape during communal or sectarian violence; or
- (h) commits rape on a woman knowing her to be pregnant; or
- (j) commits rape, on a woman incapable of giving consent; or
- (k) being in a position of control or dominance over a woman, commits rape on such woman; or
- (l) commits rape on a woman suffering from mental or physical disability; or
- (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- (n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean

imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

Explanation. — For the purposes of this sub-section,—

(a) “armed forces” means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government, or the State Government;

(b) “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) “police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 1861;

(d) “women's or children's institution” means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

90. The FIR invokes Section 376(2) of the IPC. It is obvious that, even if the case of the prosecution would be treated as proved, no justification, for invoking sub- section (2) of Section 376 of the IPC, exists, for the reason that (a) the appellant was not a police officer, (b) the appellant was not a public servant, (c) the appellant was not the member of any Armed Force, (d) the appellant was not on the management or on the staff of any jail, remand home or other place of custody; neither was the prosecutrix X the inmate of any such place, (e) the appellant was not on the management of the staff of a hospital, (f) the appellant was not a relative, guardian or teacher of the prosecutrix X, (g) the appellant did not commit the alleged act of rape during communal/sectarian violence, (h) X was not pregnant, (i) X was not under 16 years of age, (j) X was not incapable of giving consent to the act, (k) the appellant was not in a position of control or dominance over X, (l) X was not suffering from any mental or physical disability, (m) the appellant had not caused any grievous bodily harm, or maimed, disfigured or endangered the life of X and (n) the appellant had not committed rape, repeatedly, on X. If at all, therefore, the appellant would have been charged only under Section 376(1) of the IPC.

91. Depending on the age of the prosecutrix X, the ingredients of Section 376(1) of the IPC and Section 4 of the POCSO Act are not the same. In case the prosecutrix X is found to be less than 18 years of age, then the appellant would, in case he has actually committed “penetrative sexual assault” on X, be liable for commission of the

offence of “rape” as defined in Section 375 of the IPC, read with Clause “Sixthly” thereunder, as well as under Section 4 of the POCSO Act. “Penetrative sexual assault”, as defined in the POCSO Act would, *ipso facto*, also amount to “rape” within the meaning of Section 375 of the IPC, if it is committed on a victim who is under 18 years of age, with or without her consent. (The “age of consent” was raised from 16 to 18 by the amendment, to Section 375 of the IPC, as substituted by Section 9 of The Criminal Law (Amendment) Act, 2013, which would apply in the present case, the date of offence being 26th February, 2013.) As such, if it is found that the age of the prosecutrix X was less than 18, the appellant would, by virtue of that sole fact, read with the findings entered by me hereinabove, be guilty of having committed the offence contemplated by Section 4 of the POCSO Act, and no requirement of referring, to Section 375 or 376 of the IPC would, therefore, survive.

92. If, however, the evidence is found to be insufficient to sustain a conclusive finding that the prosecutrix X was less than 18 years of age, as alleged, while Section 4 of the POCSO Act would automatically stand eviscerated, it would remain to be considered as to whether the appellant had, or had not, committed the offence under Sections 375 and 376 of the IPC, as, for sustaining a finding of an offence, under these provisions, having been committed, it has to be established that the act was against the will, or with the consent, of the prosecutrix. As has already noticed hereinabove, though Section 376 (albeit sub-section (2) thereof) was invoked in the FIR (Ex. PW-9/A), no reference, to the said provision, finds place in the charge sheet

issued consequent thereto. In view of Section 464 of the Cr.P.C., however, this lacuna cannot be allowed to affect the ultimate outcome of the proceedings. In exercise of the powers conferred by sub-section (2) of the said provision, therefore, I deem it appropriate to direct the Learned ASJ to frame a charge, of commission of offence, by the appellant, under Section 376 of the IPC and, thereafter, recommence the trial, afresh, from the said stage. In view of my finding, above, that “penetrative sexual assault”, as contemplated by Section 3 of the POCSO Act had, in fact, been committed by the appellant on the prosecutrix X, all that would be required to be examined, while assessing the applicability, to the facts of the case, of Section 375/376 of the IPC, would be whether the facts attract Clause “firstly” and/or “secondly” of Section 375, i.e., whether the act had been committed against the will, or with the consent, of the prosecutrix X. Needless to say, the occasion for venturing into the terrain of Sections 375/376 of the IPC would arise only if the submission, of Mr. Singhal, regarding the insufficiency of the available evidence, to hold that the prosecutrix X was less than 18 years of age, is found to deserve acceptance.

Re. Section 342, IPC

93. Section 342 of the IPC deals with “punishment for wrongful confinement”, and reads thus:

“342. Punishment for wrongful confinement. – Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

“Wrongful confinement” is, in turn, defined, in Section 340 of the IPC, thus:

“340. Wrongful confinement. – Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said “wrongfully to confine” that person.”

94. I have already held, hereinabove, that the act of “penetrative sexual assault”, within the meaning of Section 3 of the POCSO Act, was committed by the appellant on the prosecutrix X, on the rear seat of his car. The prosecutrix X, in her statement under Section 164 of the Cr.P.C., as well as in her testimony before the Learned ASJ during trial, clearly alleged that the appellant had pushed X onto the rear seat of the car, locked the doors of the car and committed the said act. In view thereof, the offence of wrongfully restraining the prosecutrix X, with the intent of preventing her from escaping from the car, obviously stands proved against the appellant. Incidentally, the sentence of one year’s rigorous imprisonment, awarded by the Learned ASJ to the appellant, for committing the offence under Section 342 of the IPC, already stands suffered by him.

Re. Section 367 of the IPC

95. Section 367 of the IPC reads thus:

“367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. – Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be

likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.”

“Kidnapping” is defined, in Section 359 of the IPC, as “of two kinds: kidnapping from India, and kidnapping from lawful guardianship. It is nobody’s case that the prosecutrix X was kidnapped from India. “Kidnapping from lawful guardianship” is defined, in Section 361 of the IPC, in the following terms:

“361. Kidnapping from lawful guardianship. – Whoever takes or entices any minor under 16 years of age if a male, or under 18 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation. – The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception. – This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

“Abduction” is defined, in Section 362, thus:

“362. Abduction. – Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

96. On plain facts, it cannot be said that the appellant, by force, compelled the prosecutrix X, or induced her, by deceitful means, to go from any place. As such, no offence of “abduction” can be said to be made out against the appellant.

97. Insofar as the offence of “kidnapping”, is concerned, by virtue of the express words contained in Section 361 of the IPC, the said offence would be made out, against the appellant, *qua* the prosecutrix X, only if it is established that the prosecutrix X is under 18 years of age. We come back, therefore, to square one. This aspect would also have to be reconsidered by the Learned ASJ, after arriving at the conclusion regarding the age of the prosecutrix, in the terms already set out herein above.

Conclusion

98. The appeal is, therefore, partly allowed, in the following terms:

(i) The finding, of the Learned ASJ, to the effect that the appellant had committed “penetrative sexual assault” on the prosecutrix X, within the meaning of Section 3 of the POCSO Act, is upheld.

(ii) However, as the finding, of the Learned ASJ, that the prosecutrix X was less than 18 years of age, is not based on sustainable evidence, it is quashed and set aside. Consequently, the conviction of the appellant, under Section 4 of the POCSO Act, and under Section 367 of the IPC, along with the sentences

imposed on the appellant for commission of the said offences, are also quashed and set aside.

(iii) The Learned ASJ is directed to re-examine the issue of the age of the prosecutrix, keeping in mind the observations contained in paras 79 to 83 of this judgment *supra*.

(iv) Consequent to his decision/findings, regarding (iii) hereinabove, the Learned ASJ would reconsider the issue of conviction, of the appellant, under Section 4 of the POCSO Act, and Section 367 of the IPC.

(v) In the event of the appellant being acquitted of the charge of having committed the offence under Section 4 of the POCSO Act, the Learned ASJ shall proceed to frame an additional charge, against the appellant, regarding the commission of offence under Section 376 (1) of the IPC. The Learned ASJ will proceed, in that event, to retry the appellant, on the said offence. The re-trial shall take place in accordance with Section 217 of the Cr.P.C. – a course of action advocated by the High Court of Allahabad in its judgment in ***Krishna v. State of U.P., 2017 (100) ACC 774; MANU/UP/1343/2017***, with which I express my respectful concurrence. Needless to say, should the Learned ASJ convict the appellant under Section 376 (1) and/or Section 367 of the IPC, he shall also proceed to decide the issue of sentence to be awarded to the appellant consequent thereto.

(vi) The conviction of the appellant under Section 342 of the IPC, and the sentence awarded, in that regard, to the appellant, by the learned ASJ, are upheld.

99. The Learned District Judge is directed to assign the case to the appropriate jurisdictional ASJ and inform the parties accordingly. The parties would appear before the jurisdictional ASJ on 21st May, 2019. The Learned ASJ is directed to proceed as expeditiously as possible in the matter and to arrive at a final judgment, in compliance with the above directions, preferably within a period of 6 months from the date of presentation, before him, of a certified copy of this judgment.

100. At this stage, Learned counsel for the appellant prays that his client may be granted bail during pendency of the *de novo* proceedings before the Learned ASJ.

101. The appellant had, with the appeal, filed an application for grant of bail, which was not pressed, as the appeal was being taken up for hearing. He has already suffered six years eight months incarceration, out of the total period of 10 years RI, which was imposed on him. I am inclined, therefore, to grant bail to the appellant in the present case, subject to his furnishing surety bond of ₹ 25,000/- or like amount to the satisfaction of the learned ASJ. This would, needless to say, be subject to the appellant not requiring to be incarcerated in any other case and remain subject to the outcome of the *de novo* proceedings before the Learned ASJ.

102. The registry is directed to return the trial court record expeditiously.

C. HARI SHANKAR, J

MAY 06, 2019/dsn

